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The Defence of Superior Order

A comparison of the legal situation in Germany,
the United States of America and South Africa

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„He is free from blame who is bound to obey"

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A. Introduction

In most of the situations where is more than one person involved one person is superior to the other. The father is superior to his child, the employer is superior to the employees, the captain is superior to his team or the general is superior to his soldiers. If there is a task to be carried out, any person may carry this task out on grounds of free will. But if the person does not want to carry out this task, then the superior may order him to do so. But what happens if the task carried out after such an order been given proves to be wrong? What if it even fulfils the definition of the crime? The ordered person may be accused of committing a crime and then may say: "But I was ordered to do so. Blame my superior but not me!"

This dissertation will deal with the legal background of this "defence" raised by the accused. It will compare the three different legal systems of Germany, the United States of America and South Africa to determine on which grounds a superior order given prior to the act can serve as a basis for a defence. The three legal systems, the history, the acceptance by the courts and all the prerequisites established in the course of decades of jurisprudence will be analysed in order to establish a scheme under which these countries deal with superior orders being involved prior to a crime or offence committed by the receiving inferior.

A.1 Superior order as a product of subordination

"Order" is not a legal term. Except for a few codifications in the world which deal with military power of command it is unknown to the legal

language. Yet one comes across the order in so many situations and in so many disguises. All these situations and disguises have one thing in common, a power to enforce and concretise a certain human behaviour due to existing rules which leads to a relationship defined by subordination between the superior who is giving orders and the inferior or addressee who receives the order and carries it out. This shows the three necessary elements determining the legal environment of an order: a relationship of subordination[1], a person equipped with the power to enforce (power of command) and another person under the same relationship with the duty to obey. The order is the typical product of this subordination and in most situations means of communication in the relationship between superior and the receiver of the order.

The relationships of subordination mentioned above can be divided into two different categories. The common subordination as it is encountered in the relationship between citizen and state authorities and the special subordination in all other cases where the three prerequisites[2] apply.

A.1.1 Common subordination

Administrative law rules the common subordination and the citizens do not act on grounds of orders but on grounds of the rules set out in this field of law. If a citizen acts unlawful or a decision has to be made which is not part of the law but concretises it the state uses its catalogue of administrative acts to rule the inferior citizens.[3] These type of „orders" very seldom play a role

[1] assumed that it is a lawful one
[2] as set out in chapter „the order as a product of subordination"
[3] e.g. notification, advice, directive, ruling *et cetera*

in criminal law and will therefore not be discussed in the course of this dissertation.

A.1.2 Special subordination

The real problems start with the order within the relationships of special subordination, because one has to leave the safe grounds of positive law and faces situations where grounds, extents and effects of the order as well as of the power of command are defined insufficiently.[4]

A person can enter into a relationship of special subordination on a free will as he or she becomes an employee[5] and faces the superiority of his or her employer. In most of the countries some persons can be forced to enter in such a relationship, like the man joining military service or children who have to go to school. Both did not enter into this relationship on grounds of a free will but were forced to join army or school for the time being a soldier or a pupil. The third way to enter into a relationship of special subordination is a factual one. By entering a public library or a public bath the entering person is tacitly agreeing to the terms and conditions concerning the use of this institution. Though relevant for the group of special subordination this case hardly leads to an order with impact on criminal law. Thus the relationships in school, at work and in the military service are the ones where superior orders can lead to the involvement of criminal law.

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[4] this varies from country to country as will be seen from the following chapters
[5] that includes state-employees and civil servants

A.2 Superior order in criminal law

As long as the superior order is lawful and leads to lawful behaviour its role is not worth mentioning as far as criminal law is concerned. The same applies where an unlawful order leads to lawful behaviour. In this case civil rights may have been infringed but without any impact on criminal law. But in the moment in which an unlawful order that is binding for the addressee leads to an unlawful behaviour complying with the definition of a crime criminal law is challenged to judge the consequences the superior order may have for the culprit. Thus it has to be kept in mind that it is only the superior order, unlawful but binding, that may serve any purpose in the course of defending an accused.

B. The Federal Republic of Germany

Before the judicial history of the role of a superior order can be reported it has to be pointed out that there are major differences in the structure of liability between South Africa and Germany.

B.1 Structures of Liability in German and SA practice

South Africa determines the criminal liability of a person by having certain elements presented and proved in front of court beyond reasonable doubt. The first element is the act that fulfils the prerequisites of a proscription.[6] Though the South African courts have not yet explicitly acknowledged the

[6] *Snyman* p60 *et seq.*

fulfilment of a proscription as a separate requirement, in this dissertation it will be regarded as forming part of the general requirements for criminal liability.[7] In a second step the unlawfulness of the act has to be determined. Since 'unlawful' is only another legal term for 'unjustified' the absence of any justification establishes the unlawfulness of the act. The final element on the way to the culprit's criminal liability[8] is culpability or *mens rea*. This requirement comprises of more than one subjective element, predominantly the culprit's criminal capacity, his intention[9] and his awareness of the unlawfulness of his act at the time[10] of the commitment.

Germany follows also a „three-step-test". The first step is called „Tatbestand" and comprises of two prerequisites. The fulfilment of the first prerequisite is determined objectively and consists of the completion of a written proscription, since Germany obeys to *nulla poena sine lege*, which means in the light of the constitution[11] written law. This is backed up.by the second prerequisite called „subjektiver Tatbestand". It comprises first of all of general intention („Vorsatz") and depending on the specific proscription infringed of another specific intention called „Absicht".[12] This form of intention requires *dolus directus*, while the 'normal' intention only requires *dolus eventualis*. In a second step the unlawfulness is determined through establishment of absence of any justification, and its subjective pendant again backs up this objective criterion. The culprit must have acted in the

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[7] see also *Snyman* p144
[8] not necessarily conviction!
[9] colourless
[10] exception: *actio libera in causa*
[11] „Grundgesetz" from 1949
[12] e.g. theft in § 242 StGB (s242 Criminal Code of Germany) requires „Zueignungsabsicht", the intention to convert the stolen goods to the culprit's own use

knowledge of the specific[13] ground of justification in order to get his act rendered lawful. In the last step the culpability („Schuld") has to be determined. Similar to South Africa it comprises of different elements. Criminal capacity and the ability to be aware of the unlawfulness[14] of the culprit's act are two major elements with intention not forming a part of it.[15]

In connection with culpability there are two basic grounds known in the German criminal law, which eliminate culpability: „Entschuldigungsgrund" and „Schuldausschließungsgrund". While the first one is usually connected to the circumstances under which the culprit acted, the second refers as „persönlicher Schuldausschließungsgrund" to reasons in the person of the culprit. The first one is of considerable implications for the role a superior order can play. It eliminates the blameworthiness and will be referred to in this dissertation by using the term 'excuse', since there is no more appropriate term in the English language.

B.2 History

Already in 1872 the German Military Penal Code provided that only the superior officer who had issued an unlawful order should be liable to punishment, but the discussion of the effects of superior order really heated up after the Second World War[16], when the argument that the doctrine of

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[13] in the case that he or she belived to act on grounds of a different defence than the one that applies the consequences are dtermined according to the theory on mistake of justification („Rechtfertigungsirrtum")

[14] „Einsichtsfähigkeit"

[15] in connection with mistakes the Federal Penal Supreme Court („Bundesgerichtshof für Strafsachen") recognises the reproach of having formed an intention („Vorsatzschuldvorwurf") as an element of culpability, which is of no consequence for this dissertation

[16] 1939 - 1945

repondeat superior promotes lawlessness on a large scale was strengthened by the atrocities committed in the course of this war. Seeking defence at the Nuremberg Trials[17] tried to invoke this doctrine in order to defend their crimes. During these trials Field Marshal Wilhelm Keitel[18] admitted that

> "the traditional training and concept of duty of the German officers which taught unquestioning obedience to superiors who bore responsibility, led to an attitude - regrettable in retrospect - which caused them to shrink from rebelling against these orders and these methods even when they recognised their illegality and inwardly refuted them".[19]

After these trials and the various futile attempts to rely on superior order as a defence legal writers in Germany discussed for decades the question whether a superior order, unlawful but binding, delivers a defence on grounds of justification[20] which renders the unlawful act of the culprit lawful or serves as an excuse.[21] While a lawful superior order was recognised as a justification, the unlawful superior order was treated differently. According to the leading opinion during the 60s the unlawful superior order could only create unlawful behaviour of the inferior since his power to act only derived from the power of his or her superior. Therefore unlawfulness could not be rendered lawful simply by passing on a command to an inferior rank or position. As a consequence the courts and the legal writers faced the problem that in the light of the obligation to obey the

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[17] "Nürnberger Prozesse"
[18] from 1938 to 1945 Chief of Staff of the High Command of the Armed Forces
[19] as quoted in Eden, p642 with reference to the source of the quote
[20] „Rechtfertigungsgrund"
[21] Due to this split effect the term respondeat superior will be avoided in the course of this dissertation

inferior addressee of the order in principal had no choice to avoid his or her unlawful behaviour.

They therefore reduced the obligation to obey and established the principle that in cases of an unlawful order the duty not to act unlawful has to be regarded as of the same value as the duty to obey the order.[22] This principle was later codified in the laws regarding civil servants[23] [24] and the law for police forces regarding immediate compulsion.[25] As a result the act of the culprit stayed unlawful, but was not automatically excused.

With regard to the culpability or blameworthiness the culprit is only excused, if he had no chance to recognise that carrying out the superior order will lead to a crime or to an offence[26]. If the culprit could have recognised his act complying with a codified proscription or if he actually did recognise these circumstances he cannot be excused.[27] That includes also the case, if the culprit knew he would commit a crime but regarded the superior order he or she received at absolutely binding.[28] The only exception is made in connection with executive civil servants[29] like police officers on active service. A culprit of this group had been regarded as acting with limited culpability due to the fact that the work of these people depends on quick decisions and fast taken action.[30] While this has been said for crimes,

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[22] see D Oehler JuS 1963, p304
[23] civil servants = „Beamte"
[24] s56 Federal Civil Servants Act (§56 BBG = Bundesbeamtengesetz); s38 Civil Servants Outline Legislation Act (§38 BRRG=Beamtenrechtsrahmengesetz)
[25] s7(2) Immediate Compulsion Act (§7 II UZwG = Gesetz über den unmittelbaren Zwang)
[26] there is still a difference in Germany between crime and offence in the meaning of crime being a „Verbrechen" or „Vergehen" and offence being an „Ordnungswidrigkeit" or „Übertreteung" (old legal term)
[27] BGH NJW 1961, p374 (BGH = Federal Supreme Court; NJW = Neue Juristische Wochenschrift)
[28] see Oehler *supra* pointing out the missing of a matching excuse for this kind of mistake
[29] „Vollzugsbeamte"
[30] see again s7(2) Immediate Compulsion Act

regarding „Ordnungswidrigkeiten“ and „Übertretungen“[31] these people are fully excused. The reason for that is the *principle of unreasonableness*. The law does not want to force members of these groups of civil servants to make the decision whether to obey or to refuse.[32]

B.2 Today

Germany faces today the same situation as in the 60s with the only difference that there are more than a million civil servants in relationships of special subordination and the military personnel meanwhile doubled.

The first basic principle discussed above is still the same. It does not sound right that a superior can turn unlawful intention into a lawful act executed by the receiver of his or her superior order. Therefore if the superior is wrong he passes on his wrongfulness to the inferior who carries out the act itself.[33] On the other side an inferior cannot expect to be freed from any criminal liability, if he carries out an obviously criminal order and tries to use the „law-blindness“[34] of his or her superior as an excuse/justification.[35] In order to silence the ongoing discussions regarding the unlawful order the tendency from the 60s influenced the statutes and today's laws regarding civil servants and military expresses explicitly how to deal with unlawful superior orders:

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[31] even less than the Anglo-American misdemeanor

[32] Oehler *supra*

[33] see LK-*Hirsch*, before s32, n165 (LK = Leipziger Kommentar); Ostendorf JZ 1981, p173 (JZ = Juristenzeitung); LK-*Spendel*, s32, n90 *et seq*; Sch-Sch-*Lenckner*, before s32, n87)

[34] „Rechtsblindheit“

[35] BGH NStZ 1986, p313 (NStZ = Neue Strafrechtszeitung): „Ein Befehlsempfänger, der einen von ihm als verbrecherisch durchschauten Befehl ausführt, wird durch die Rechtsblindheit des befehlenden Vorgesetzten nicht von der eigenen strafrechtlichen Verantwortlichkeit befreit.“

B.2.1. Civil Servants - Obedience

The above mentioned s56 BBG and s38 BRRG have been amended a few times and today declare an unlawful order not binding. The inferior civil servant has to execute his superior's order only „sofern nicht das ihm aufgetragene Verhalten strafbar oder ordnungswidrig [...] ist oder [...] die Würde des Menschen verletzt".[36] Corresponding provisions can be found in the legislation of the German federal states and the Immediate Compulsion Act[37]. If it is not sure whether or not the superior order will lead to a crime the Federal Supreme Court[38] stated, that there are

> „doubts possible, whether the compulsory nature of the order even then ceases, if there is only a possibility that carrying out the order will lead to a crime committed by the inferior"[39].

This problem is not even today solved, but the majority of the legal writers tends to deny the discontinuation of the order's binding character in case of an abstract danger to lead to a crime and accepts that the discontinuation in case of a specific danger.[40]

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[36] *if the behaviour ordered [by the superior] means committing a crime or an misdemeanor or violates human dignity*, s56(2)(3) Federal Civil Servants Act, s38(2)(2) Civil Servants Outline Legislation Act

[37] UZwG (Gesetz über den unmittelbaren Zwang)

[38] BGHSt 19, p232

[39] „[...] Zweifel möglich, ob die Verbindlichkeit des Befehls auch dann entfällt, wenn sich der Befehlsempfänger durch die Ausführung der befohlenen Handlung mit mehr oder weniger großer Wahrscheinlichkeit eines rechtswidrigen Vergehens schuldig machen würde."

[40] of this opinion e.g. Sch-Sch-*Lenckner*, before s32, n90, Jakobs and Roxin, p657, n20; opposed: Jescheck

B.2.2 Military Service - Obedience

For personnel in the military hierarchy s11(2)(1) Soldier Act[41] states: „Ein Befehl darf nicht befolgt werden, wenn dadurch eine Straftat begangen würde".[42] Since the refusal to obey an order is a crime under the German Armed Forces Criminal Code[43] even this code has to deal with superior order. After giving the definition of order[44] as being „an instruction to act in a certain way, given by a military superior (s1(4) Soldier Act) to an inferior, given in writing, oral or otherwise and given in principal or for a particular case and with the demand of obedience" and establishing the refusal to obey as a crime, s22(1) sets out the conditions under which the refusal of obedience is not unlawful:

> „[In the case of s20] the inferior does not act unlawful, if the order is not binding and especially if not given for an official purpose or is infringing human dignity or if by following the order a crime would be committed. The aforesaid is also valid, if the inferior beliefs erroneously the order has been binding".[45]

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[41] §11 II 1 SoldG (Soldatengesetz)

[42] *An order must not be obeyed, if otherwise a crime would be committed.*

[43] §20 WStG (Wehrstrafgesetz)

[44] §2 Nr.2 WStG: „eine Anweisung zu einem bestimmten Verhalten, die ein militärischer Vorgesetzter (§1 IV des Soldatengesetzes) einem Untergebenen schriftlich, mündlich oder in anderer Weise, allgemein oder für den Einzelfall und mit dem Anspruch auf gehorsam erteilt"

[45] §22 I WStG: „In den Fällen der §§ 19 bis 21 handelt der Untergebene nicht rechtswidrig, wenn der Befehl nicht verbindlich ist, insbesondere wenn er nicht zu dienstlichen Zwecken erteilt ist oder die Menschenwürde verletzt oder wenn durch das Befolgen eine Straftat begangen würde. Dies gilt auch, wenn der Untergebene irrig annimmt, der Befehl sei verbindlich.

B.2.3 Justification or Excuse

Though the solution for the question of obedience has been answered and thus the inferior's predicament in the case of an order to commit a crime has been defused, the question whether the superior order may serve as a justification or as a excuse is not yet answered a hundred percent. The answer to this question has in Germany under two aspects serious impact.

B.2.3.1 Legal Aspects

The **first aspect** is the criminal liability of accomplices[46]. The person in Germany acting in compliance with the proscriptions of conspiracy[47], incitement[48], aiding and abetting[49] is only criminal liable, if the main perpetrator's crime was committed intentional and unlawful. Therefore the person rendering service in order to assist a person committing a crime on grounds of a superior order cannot be held criminal liable, if the superior order serves as a justification. In this case the acting inferior would have acted intentional but not unlawful and thus the prerequisites of the proscriptions for accomplices have not been met.

The **second aspect** is everybody's right of self-defence. According to s32 of the German criminal code „self-defence is the defence that is necessary to

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[46] in the popular meaning, see Snyman, p257
[47] Versuch der Beteiligung, §30 StGB
[48] Anstiftung, §26 StGB
[49] Beihilfe, §27 StGB

avert a present and unlawful attack from himself or a third person"[50]. Again, if the inferior acts on grounds of a superior order and this order renders his act lawful the person attacked has got no right to self-defence.

B.2.3.2 Legal Opinions

Before this background the German courts, the legal writers and the organs of legislation in Germany are struggling to find a viable solution. Due to the consequences pointed out with regard to the criminal liability of accomplices and the right to self-defence the leading opinion among the German writers is that a superior order should serve only as an excuse.[51]This opinion is predominantly based on the consideration that an unlawful order cannot convert wrong into law and that a superior cannot get something done lawfully through an inferior what he can only do by himself unlawfully.[52]

The opponents of this opinion see in the superior order solely a justification.[53] Their argument is that granting the superior order the status of an excuse will lead to an intolerable situation. It seems unfair to put a civil servant or a soldier under the obligation to execute an order, but simultaneously declaring his action, which is in accordance with his or her duty, as unlawful and finally to expose him or her to the effects of self-defence.

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[50] §32 II: „Notwehr ist die Verteidigung, die erforderlich ist, um einen gegenwärtigen rechtswidrigen Angriff von sich oder einem anderen abzuwenden."
[51] see Amelung JuS 1986, p337; Küper JuS 1987, p92; LK-*Spendel*, s32, n90 + 100 *et seq.*
[52] Roxin, p655, n17
[53] Sch-Sch-*Lenckner*, before s32, n88a with regard to the legal writers Jakobs, Jescheck, Schmidhäuser, Stratenwert

B.2.3.3 Present Situation (status quo)

Looking at the present situation a distinction is made between the superior order that is binding and the superior order that is not binding.

B.2.3.3.1 Superior Order - not binding

If the superior order is not binding and the inferior executes this order by committing a crime or a misdemeanor the inferior is criminal liable to the extent he ought to have foreseen the unlawfulness of his conduct. But if he believed that the order of his superior was binding he acted with reduced culpability or in some cases even without culpability.[54] This is the result of the culpability's element of blameworthiness and is reflected in various passages of the codified law[55], especially s5(1) of the Armed Forces Criminal Code[56]. This section reads as follows:

> **s 5 Acting under Order**
>
> (I) If - because an order was given - an inferior commits an unlawful act that complies with the prerequisites of a criminal code, he or she acts only with culpability, if he or she knows that the act is unlawful or - due to the circumstances - the unlawfulness is obvious.[57]

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[54] Wessels, p119 with further references given

[55] see s56(2)(3) Federal Civil Servants Act and s38(2)(2) Civil Servants Outline Legislation Act

[56] §5 II WStG

[57] „Begeht ein Untergebener eine rechtswidrige Tat, die den tatbestand eines Strafgesetzes, auf Befehl, so trifft ihn eine Schuld nur, wenn er erkennt, daß es sich um eine rechtswidrige Tat handelt oder dies nach den ihm bekannten Umständen ersichtlich offensichtlich ist."

Though this section does not mention that it only deals with an order that is not binding it can be drawn from the context that it is limited to this field. Beside these codifications there are no more sections dealing with the non-binding order. Therefore and due to the fact that the cited laws only apply to civil servants and soldiers[58] one tends to assume that a superior order that is not binding may only serve as an excuse for soldiers and civil servants. But since this would be a violation of s3[59] of the German Constitution[60] the courts started to apply s5 Armed Forces Criminal Code by drawing an analogy to other cases involving people not being soldiers or civil servants.

B.2.3.3.2 Superior Order - binding

With regard to the binding superior order the leading opinion followed by the courts is to treat the order as a justification. This situation is treated as a collision of duties[61]which is usually subsumed under s34 German Criminal Code[62], though in the case of superior order the duty to obey (duty to act) collides with the duty not to act unlawful (duty to omit) while s34 applies only to the collision of duties to act.[63]

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[58] e.g. s1(1) Armed Forces Criminal Code: „This act only applies to crimes commited by soldiers of the [German] federal armed forces (= Bundeswehr)"

[59] principle of equality before the law

[60] Grundgesetz

[61] „Pflichtenkollision"

[62] §34 StGB Rechtfertigender Notstand (justifying necessity): „Wer in einer gegenwärtigen, nicht anders abwendbaren Gefahr für Leben, Leib, Freiheit, Ehre, Eigentum oder ein anderes Rechtsgut eine Tat begeht, um die Gefahr von sich oder einem anderen abzuwenden, handelt nicht rechtswidrig, wenn bei Abwägung der widerstreitenden Interessen, namentlich der betroffenen Rechtsgüter und des Grades der Ihnen drohenden Gefahren, das geschützte Interesse das beeinträchtigte wesentlich überwiegt. Dies gilt jedoch nur, soweit die Tat ein angemessenes Mittel ist, die Gefahr abzuwenden."

[63] see remarks from Roxin, p656, n18, fn22

In this collision conflict the public interest in the obedience of the soldier or the civil servant is today rated higher than the interest in the avoidance of a lawful act when it comes to minor offences. But in the case of serious offences like crimes or the violation of human dignity the public interest in the avoidance of unlawful behaviour enjoys priority. The arguments[64] brought up in favour of a solution relying on the superior order as an excuse are not longer regarded valid, because first of all the approach that a justification will turn „wrong" into „right" is not justified. The superior's behaviour stays unlawful though it is carried out by means of a lawful tool meaning the lawful acting inferior. With regard to self-defence this right is admittedly discontinued[65], but the consequences are not as fatal as displayed by the opponents of the justification-theory. If the inferior is committing a crime during carrying out a superior order the order is not binding and therefore the rules discussed above in connection with a not binding superior order apply. Thus the victim keeps the right to self-defence. Beside this the victim has in any event the right to sue the superior who will usually be only a representative of the state, if he or she suffers damages and last but not least even the victim has got the right to defend with the provision of s35 Criminal Code at his side rendering his unlawful defence lawful[66] provided he or she judged the situation right.

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[64] see chapter B.2.3.2
[65] for a catalogue of solutions see LK-*Spendel*, s32, n75 *et seq.*
[66] on grounds of justifying neceessity

B.3 Recent German Cases on Superior Order

B.3.1 Introduction

After the breakdown of the eastern block countries and the fall of the German wall, the German courts had to deal with a huge amount of cases of the former GDR[67]. Beside the former heads of state and ministers who had to stand[68] and are still standing[69] trial the "border-soldiers" or "borderpolice"[70] who served at the wall and had the order to shoot everybody who attempts to flee the territory of the GDR are the accused in ongoing trials. Though the issue whether or not a crime committed under the regime of the former GDR is punishable in the courts of the Federal Republic of Germany[71] is a major aspect in these trials, the superior order plays a very important role. In this context the Federal Supreme Court of Germany[72] had to evaluate 'intentional homicides committed by border-soldiers of the GDR at the Berlin wall'.

B.3.2 Facts of the case

1984 W and H were deployed as border-soldiers at the Berlin wall. They were patrolling the wall in order to look out for GDR-citizens who attempt to leave the territory of the GDR. The order given for the case that the soldiers catch somebody in the act of escaping read:

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67 German Democratic Republic
68 e.g. Erich Honecker
69 e.g. Egon Krenz and Günther Schabowski standing trial while this dissertation is written
70 "Grenzpolizei"
71 problems of applying act of statedoctrine under public international law
72 BGH NJW 1993, p141 *et seq.*

> "Under all circumstances and by all means it must be prevented that a person trying to escape reaches enemy territory[73]. Border-breakthroughs are under no circumstances permissible. Persons violating the border have to be apprehended or eliminated."[74]

On the 1st of December 1984 S, 20 years old, was caught in the act of climbing the wall between the suburbs Pankow (East) and Wedding (West). While standing on a ladder and reaching for the coping of the wall, W and H opened fire and shot more than 50 bullets at S. They knew that they could kill him but accepted this risk in order to execute the given order to the letter. Due to the fact that the seriously injured S was only admitted to hospital two hours after the shooting[75], he died fifty minutes after arriving at this hospital.

B.3.3 Findings of the Court

The court first had to establish the applicability of s5 Armed Forces Criminal Code. The law of the GDR contained also a provision regarding superior order[76] and because of s2 of the German Criminal Code only the more 'lenient' law could be applied. Since the GDR law lays down that even a subordinate who did not recognise that he or she was violating a criminal law proscription by executing the given order is fully criminal liable, s5 of

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[73] meant by this was West-Berlin, the free part of divided Berlin
[74] see NJW 1993, p141 bottom
[75] due to problems in connection with observance of secrecy and competence
[76] s258(1) Criminal Code of the GDR (§258 I DDR-StGB)

the Armed Forces Criminal Code of (Western) Germany was the more lenient law[77] and had to be applied. Beside this the court ruled that the scope of s5(1) - though limited to soldiers of the Federal Armed Forces of (Western) Germany - is no obstacle for applying the provision and it could be applied as an analogy due to the fact that otherwise no law would be applicable which would be "unfair"[78].[79]

Applying s5(1) H and W could only be blamed (culpability!), if the circumstances made it obvious that their act complied with a proscription of the criminal code. The court explained that the violation of the proscription to kill somebody was only obvious to the accused, if his or her act was a violation beyond any doubt.[80] The right to live is a result of human dignity and recognised throughout the community of nations. Therefore it must have been obvious that the state had no right to order the "execution" of any human being trying to climb the wall in order to move to the west.[81] The BGH confirmed this argument with the number of shots fired at S and stated that this was "a terrible act that removed any reasonable ground of justification"[82] and that the majority of the East-German population disapproved of the use of weapons at the border.

The court of appeal found W and H guilty and had no reason to doubt confirming full criminal liability, though it found out of other reasons a mitigation of the sentence appropriate.

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[77] compare with the dicussion of s5(1) above
[78] "unbillig"
[79] BGH NJW 1993, p149
[80] BGH *supra* with regard to leading commentaries for the Armed Forces Criminal Code (WStG)
[81] argument of the *judex a quo* at the Landgericht Berlin (court delivering verdict now heard on appeal to BGH)
[82] "[...] ein deratig schreckliches und jeder vernünftigen Rechtfertigung entzogenes Tun [...]"

C. The United States of America

Since a valid defence or excuse on grounds of a superior order given by a superior to his or her subordinate requires a conflict-situation, every system providing the defence or excuse on grounds of superior order needs a recognised prohibition of disobedience. In the United States of America (USA) this prohibition is laid down in artt. 90(2), 91(2) and 92 of the Uniform Code of Military Justice from 1950. Beside this the treatment and function of superior orders preceding a crime or offence in the USA have a long history.

C.1 History

One of the most important judgements dealing with the superior order serving as a defence was delivered already nearly 200 years ago in *United States v Bright* in 1809[83], where the Circuit Court held, that

> "[...] the order of a superior officer to take the life of a citizen, or to invade the sanctity of his house and to deprive him of his property, would not shield the inferior against a charge of murder or trespass [...]"[84]

and which subsequently led to a verdict against Bright. This absolute point of view was moderated in 1866, when in *Riggs v State* the court limited the exclusion of superior order as a defence to "manifestly illegal orders" the court defined as "in its substance being clearly illegal, so that a man of

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[83] Circuit Court, Pennsylvania, Case No.14,647, 24 Federal Cases, p1232 *et seq.*

ordinary sense and understanding would know as soon as he heard the order read or given that such order was illegal"[85]. From this judgement and from subsequent American cases dealing with the classification of superior order it became clear that such order under the limitations expressed in *Riggs v State* serves as a ground of justification rendering the unlawful act committed by the inferior lawful.[86]

In 1941 the Massachusetts Supreme Judicial Court[87] was first to analyse carefully a soldier's situation contravening the law while executing an unlawful order of his superior. In this case private Neu of the US Army was ordered to drive a truck in seventh position of a convoy, to "follow through regardless" in order to keep up with the convoy and if the head of the convoy went through red lights [robot] he had "to go through, too". The commanding officer B then added that any driver who got lost would be tried by court martial. During the driving in the convoy the convoy went through red lights and private Neu was injured due to an accident occurring at these lights. The court held:[88]

> "[5] But since the jury could find on the evidence that the illegal order was given, it becomes necessary to inquire as to its effect (if given) upon the plaintiff[89]. The plaintiff was not in the position of an agent or employee who has received an illegal order from his principal or employer. He was a soldier. Even in time of peace obedience to orders is the first duty of a soldier. He is not expected to argue points of law with his superior

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[84] *ibid supra* at p1237 end
[85] Inbau, p692
[86] Eden, p645 bottom
[87] in Neu v McCarthy, p570 *et seq.*
[88] *ibid supra*, p573

> officers. Failure of instant obedience leads to military punishment, which may be severe. Recognition of the peculiar necessity of discipline in the military service and of the position in which the subordinate may find himself through no fault of his own in the event that commands of his superiors clash with the civil authority has led courts in well considered cases to regard obedience to a military order as a justification for conduct which would otherwise give rise to civil or criminal liability, unless the order is so palpably unlawful that a reasonable man in the position of the person obeying it would perceive its unlawful quality."

Following the atrocities in the war between the USA and Vietnam trials during the 70s had again to focus on the implications of superior order. In *United States v Calley*[90] the court continued the more subjective approach started in Massachusetts in 1941 and employed this approach in order to determine the consequences of an unlawful order given by the superior:

> "The acts of a subordinate done in compliance with an unlawful order given to him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful."[91]

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[89] private Neu
[90] 22 US CMA 534 (1973)
[91] as quoted by Inbau, p687

With this verdict the ground of justification mutated into an excuse, which is under American law not the same like a justification as indicated e.g. in §1.12(3)(c) Model Penal Code.[92] Beside this the scope of this excuse (former justification) had also been limited, since after these judgements not only positive knowledge of the unlawfulness made the defence of superior order impossible, but also any situation or circumstances under which "a reasonable man" or "a man of ordinary sense and understanding" would know the act to be unlawful. Subsequent judgements followed this idea.[93]

C.2 Today

The legal situation today is still determined and dominated by the judgements, since the law has not yet been codified in all states. Beside this the Model Penal Code, drafted 1962 is not yet in force, but already serves as means of interpretation various purposes on various fields.

Before and after the draft of the Model Penal Code the position of the courts upholding their subjective approach by granting only limited access to the excuse on grounds of superior order became more and more object of criticism. The legal writers and the American Law Institute[94] admitted that the quality of discipline is properly more rigorous in military organisations than in civilian ones, and so provided a special defence based on adherence to military orders. But on the other hand they did not want to honour the special circumstances a soldier is in like it was pointed out in Neu v McCarthy by the Supreme Judicial Court of Massachusetts by giving these

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[92] American Law institute, Model Penal Code, p186
[93] e.g. Calley v Calloway as reported in LaFave, p441
[94] Model Penal Code, p389

subordinates blanket immunity comparable to the Rhode Island law (1968) under which "the actor is not liable, civilly or criminally, for any acts done while under orders of a superior officer"[95]. While some states granted blanket immunity[96], some limit the immunity to lawful orders[97] or even grant civil immunity only[98], most of the states[99] only refer to acts done in the performance, the discharge, or the line of duty, thus leaving unclear the status of mistaken obedience to unlawful orders.

In order to compromise between the extreme positions of blanket immunity and no excuse at all in the official draft of the Model Penal Code the Institute implemented[100] in s2.10:

> **Section 2.10. Military Orders**
>
> It is an affirmative defence that the actor, in engaging in the conduct charged to constitute an offence, does no more than execute an order of his superior in the armed services that he does not know to be unlawful.

Since this codification found its place under Art. 2 and therefore among the principles of liability without further clarification it is difficult to build a parallel to the first discussed German law by saying if the defence is an excuse or a justification. Liability in the narrow sense would mean excuse, while in the wider sense it again can be both. But since the consequences are not serious like under the German law an assignment is anyway not

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[95] Rhode Island General Laws Ann. §30(7)(3)
[96] e.g. Missouri, Montana (repealed 1966), Utah and West Virgina
[97] e.g. Colorado, Minnesota, Kentucky and Florida
[98] e.g. Oklahoma
[99] e.g. California, Alabama, Arkansas, Georgia, Idaho, New Jersey, Nevada, New York, North Dacota, Oregon, and South Carolina
[100] considered and approved at the May 1962 meeting

necessary. Whatever defence it is, it is important to recognise the increment of cases in which superior orders serves as a defence. By deleting the hypothetical element based on a reasonable or ordinary person, the Institute took the difficulties into account having a civilian jury to examine the legality of military orders and the likelihood that a soldier of ordinary sense and understanding would know a given order to be illegal. The Institute therefore preferred to insulate members of the armed services from liability in civil courts except on those occasions when they knew the order to which they responded to be unlawful.[101]

D. The Republic of South Africa

Since South Africa similar to the United States of America (USA) does not rely so much on the opinion of its legal writers as does Germany, the opinions and findings of the courts provide the source for dealing with the consequences of superior orders leading to a crime. Beside this the codified law of South Africa deals only in the Military Discipline Code[102] with the obedience or disobedience of commands and orders, when it states that „[a]ny person who in wilful defiance of authority disobeys any lawful command given personally [...], shall be guilty of an offence and liable on conviction [...]"[103]. But with this duty of obedience the problem how to judge an unlawful superior order is not solved but caused. Various authorities had already to deal with this conflict.

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[101] Model Penal Code, p392
[102] First schedule of the Defence Act, No.44 of 1957, based on s104(1) Defence Act
[103] s19 „Disobeying Lawful Commands or Orders"

D.1 The Opinion of the Courts

Since the last turn of the century the South African courts have been frequently occupied with the question under which circumstances a superior order might mitigate or neutralise the subordinate's criminal liability.

D.1.1 History

Following these judgement through the past three requirements have been developed by the courts in South Africa:

a) subordinate's duty of obedience
b) superior's lawful authority over subordinate[104]
c) act inflicted no more harm than necessary[105]

The question whether or not exists an absolute duty of obedience in the person of the receiver of a superior order was first discussed by *Solomon JP* in *R v Smith.*[106]The learned judge did not dispute that the basic rule is obedience, but set out that there are exceptions to this duty that is so vital for the functioning of every military organisation. Since the limits of the duty to obey highly endanger this function, *Solomon JP* referred for the

[104] see the German „commander" in Rex v Werner and Another 1947 (2) SA 828 (A) at 834
[105] see Rex v Mayers 1958 (3) SA 793 (SR)
[106] (1900) 17 SC 561

limits to the Manual of Military Law[107] regarding the rule there as „a reasonable and proper rule to apply"[108]:

> „This states that if the commands are obviously illegal, an inferior would be justified in questioning or even refusing to execute such commands [...] [otherwise] must they [soldiers] meet with complete and unhesitant obedience."[109]

That leads in reverse to the result that every order that is not obviously illegal will serve as a defence on the side of the inferior, who committed a crime in executing this order. Since it is still too difficult to rule on this proposition, he went further mitigating this somehow absolute proposition:

> „[...] if a soldier honestly believes he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officer."[110]

This approach had been referred to in quite a few later cases, though it had not always been applied[111] and in 1944 *De Beer AJP* was the first one to question Solomon's approach. The learned judge criticised the emphasis on the inferior's perception of the lawfulness and referred then as well to the Manual of Military law as did *Solomon JP*, but arrived at a different rule

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[107] ch3, s10
[108] (1900) 17 SC 561 at 566
[109] *ibid supra*
[110] *ibid supra*
[111] see e.g. Rex v Werner and Another 1947 (2) SA 828 (AD) at 833; Rex v Kumalo and Others 1952 (1) SA 381 (AD) at 387; S v Shephard 1967 (4) SA 170 (W) at 177;

that obedience is only owed to lawful orders and with regard to classify an order as lawful stated:

> „[...] by far the sounder rule is the former one, which describes a lawful command as one not contrary to the ordinary civil law and justified by military law."[112]

After this some judges like *Ludorf J* in *R v Arlow and Another*[113] followed the strict approach of *De Beer AJP* by stating that „[h]y is alleen verplig om wettige bevele te gehoorsaam" or still refer to *Regina v Smith* like *Levy J* in *S v Andreas P en 'n Ander*[114]. In reverse it is also clear that any subordinate is not allowed to follow an order from which he knows that it is unlawful. Regarding soldiers this can be gathered from all judgements quoted and had been extended by *Colman J* to employees and junior co-employees in their relation to their employer and senior co-employee respectively[115], though an extension - at least for the cases of defence - to servants or employees can be doubted.[116]

D.1.2 Today

The leading case in this context is still today the case of *S v Banda*[117]. In this case the court had to decide a case, in which in 1988 a number of soldiers in

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[112] Rex v Van Vuuren 1944 OPD 35 at 38 with reference to ch3, s10 Manual of military law
[113] 1960 (2) SA 449 (T) at 452
[114] 1989 (1) PH H38 (SWA), also reported as S v Mule en 'n Ander 1990 (1) SACR 517 (SWA)
[115] see S v Shepard 1967 (4) SA 170 (W) at 178
[116] Burchell and Milton, p154; but see different opinion from De Wet & Swanepoel, p99: „Wat ons reg betref bestaan daar [...] in beginsel ook geen verskil tussen amptelike onderhoriges en ander onderhoriges nie."
[117] 1990 (3) SA 466 (B)

the Bophuthatswana Defence Force (BDF) and members of the Bophuthatswana National Security Unit[118] (BNSU) attempted a *coup d'etat* of the Bophuthatswana government. For the main part they attacked and captured the president in order to force him to resign from his post, Cabinet Ministers were attacked, their families captured and the Ministers coerced into signing resignation papers. The culprits took command of Molopo Military Base, detained certain Ministers and military personnel of the State there and occupied the Bophuthatswana Broadcasting Centre. The President, Ministers and others were kept hostage inside the National Independance Stadium. Brought before court the accused stated that

> "at all material times they participated in and executed the acts referred to in their statements in their capacity as soldiers in the BDF, and as a member of the BNSU, and acted in obedience to orders, and or instructions given to them by a person in authority over them."[119]

Friedman J dealing with the superior order as a defence raised by the accused responded in his introductory sentence that

> "[i]t is generally accepted that an act performed by a subordinate, emanating from the instruction of his superior, may, albeit within certain limits, be justified by the defence of obedience to orders."[120]

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[118] in total 143 people
[119] 1990 (3) SA 466 (B) at p472
[120] *ibid supra* at p479

After extensively discussing the previous mentioned judgements from *Regina v Smith* until *S v Mule en 'n Ander* the learned judge summed his discussion up and stated comprehensively:[121]

> „A soldier must obey orders issued by a lawful authority, and is under a duty to obey all lawful orders, and, in doing so, must do no more harm than is necessary to execute the order. Where, however, orders are manifestly beyond the scope of the authority of the officer issuing them, and are so manifestly and palpably ('klaarblyklik') illegal that a reasonable man in the circumstances of the soldier would know them to be manifestly and palpably illegal, he is justified in refusing to obey such orders. The defence of obedience to orders of a superior officer will not protect a soldier for acts committed pursuant to such manifestly and palpably illegal orders."

D.2 Legal writers

South African legal writers have accompanied the various judgements throughout the years and commented on them either favourably or critical. In their discussion of the verdicts quoted above the question whether the defence under the limitations set out by the courts will be a justification or an excuse concerning *mens rea* has always been a dominant one, which some courts have „uit die oog verloor"[122].

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[121] *ibid supra* at p496
[122] De Wet & Swanepoel, p100

If one follows the approach as in *Regina v Smith* one of the main aspects was the belief of the inferior the order being lawful. This indicates more a lack of *mens rea* in respect of the unlawfulness[123] and therefore superior order being rather an excuse than justification, though *Watermeyer CJ* in agreeing with *Solomon JP*[124] pointed already out that that mistake was a mistake of law. Since „it is a recognised principal in our criminal law that ignorance of law does not excuse [...] such a belief did not relieve them of criminal responsibility".[125] The principle of *ignorantia iuris neminem excusat* behind the learned judge's expression has been abandoned by the Appellate Division in 1977.[126] Thus there is no need for the constructed consequence by *Burchell and Hunt* highlighted *Solomon JP*'s idea that even unlawful orders could protect the inferior in cases where they are not manifestly illegal and come to the conclusion, that this fact „points to justification rather than absence of *mens rea* as the ground for exemption from liability".[127]

Beside the criticism by *De Wet en Swanepoel*[128], their (*Burchell & Hunt*) result goes hand in hand with the analysis *Snyman*[129] presents under the chapter 'Unlawfulness'. In this context *Snyman* follows clearly the difference and the argumentation that had been found in Germany. He distinguishes between lawful and unlawful orders and states that in the case of an lawful order the act is justified on the ground that the subordinate is acting in an official capacity, or because he is merely a part or an extension

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[123] Burchell and Hunt, p357
[124] Rex v Werner 1947 (2) SA 828 (AD) at 833
[125] *supra* at 835
[126] see S v De Blom 1977 (3) SA 513 (A)
[127] Burchell and Hunt *supra*
[128] p101
[129] Chapter IV, p88 *et seq.*

of the body or authority which acts in an official capacity.[130] With regard to an unlawful order *Snyman* accepted *Solomon JP*'s rule in principle.[131] If the inferior knew that the order was unlawful he, he cannot raise any defence. If he - wrongly - believed the order was lawful, he may raise the defence of mistake or error, and thus leaving him with no intention. The same aspect is given credit by *De Wet en Swanepoel*:

> „[A]s die bevel 'n opvallend wederregtelike is, kan die dader hom miskien nog beroep op afwesigheid van skuld, omdat hy onder die dwaling verkeer het dat hy wel verplig is om te gehoorsam. Hierdie verweer berus dan nie op 'n regverdigingsgrond nie, maar op afwesigheid van skuld, *in casu* afwesigheid van *dolus*."[132]

Other legal writers[133] also follow the objective test and are therefore still criticised by the courts e.g. as per *Friedman J* as being „inflexible, rigid and exacting"[134].

Still, the distinction between justification and excuse is not drawn sufficiently and it is held that the distinction between manifest and non-manifest illegality is untenable since there are no degrees of unlawfulness.[135] The idea to link the manifest illegality to the catalogue of 'grave breaches' under the Geneva Convention of 1949[136] or to any other catalogue has not been followed yet and would probably only lead to a complication of

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[130] Snyman, p123
[131] *ibid* at p124
[132] De Wet & Swanepoel, pp100, 101
[133] e.g. Joubert
[134] S v Banda at 484
[135] Eden, pp650, 651
[136] Eden, p653

superior orders and would not contribute to any solution to the conflict the soldier (or other subordinate) may be in.

With further regard to the distinction between excuse and justification *Burchell and Milton*[137] quote *Friedman J*[138] with the 'fact' that the law recognises obedience to superior orders as a case of compulsion and thus is prepared to treat unlawful conducts in exercise of such order as an excuse.[139]And *Jordaan* „on closer scrutiny" finds *Solomon JP* also „considering *mens rea* rather than whether the *actus* was *reus*"[140]. Beside this *Jordaan*, herself regards the main issue of superior orders in determining the duty of obedience as exculpatory or justificatory. While a justification renders the act lawful and thus brings it in accordance with the legal order, an excuse excludes *mens rea* and though the act does still not lie within the true interest of the law the personal culpability of the culprit is addressed[141] leading to his acquittal. An order contradicting the law cannot lie within the true interest of the law. This therefore does not lead to justification but to excuse as the appropriate defence[142], or with the words of *De Wet en Swanepoel*:

> „[W]aar die bevel self wederregtelik is, daar geen gehoorsaamheidsplig kan bestaan nie, en die handeling dus nooit geregverdig kan wees deur so 'n plig tot gehoorsamheid nie."[143]

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[137] at p153
[138] S v Banda 1990 (3) SA 466 (B) at 479
[139] Friedman J also considered *mens rea* at pp485E, 495J, 496A
[140] 1991 (4) SACJ 230 at 232
[141] *ibid supra* p233
[142] *ibid* pp233, 234

E. RÉSUMÉ

Today courts, codes and writers of all three analysed countries recognise the dilemma of soldiers, policemen or - in the case of Germany - civil servants, who are confronted with the fact that they committed a crime, offence, misdemeanour or „Ordnungswidrigkeit" in execution of an order and are at least regarding one aspect all of the same opinion that was expressed by the Circuit Court in *United States v Decker*:

> „Loyalty to a superior does not provide a license for crime."[144]

As long as the order is lawful, which means that a superior with appropriate authority acted within the legal boundaries of his capacity, all countries acknowledge the subordinate's duty to obey and since this duty is not negotiable any unlawful act occurring during the execution of the superior order as rendered lawful by means of defence of superior order.

E.1 Scopes of defence

The analysed countries and their laws show major differences only when it comes to unlawful orders. In this context the subordinate is facing the dilemma that he or she has on the one hand to obey to the order and on the other hand not to act unlawful. This dilemma is getting worse if the unlawfulness is minor and can sometimes be solved by the military codes and statutes if the unlawfulness of the order is so evidently, palpably,

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[143] p101, but excluding justification due to necessity, which has to be answered to the rules of necessity under South African law

[144] 304 F.2d 702 (6th Cir.)

„klaarblyklik" unlawful, that the duty of obedience has ceased to exist and this must be recognised by the inferior. But in the grey area of orders that are not at first sight „manifestly" illegal the law systems are trying desperately to create justice and they face their own dilemma: do they want soldiers questioning every order, because they are fully criminal liable if carrying out an unlawful order? Or do they want perfect discipline for which they have to grant an escape from criminal liability, be it exculpatory or justificatory, if an unlawful order is obeyed and executed without questioning?

At this stage the background of the answers becomes a political one, which is reflected through the different history in all three countries discussed:

E.1.1 Germany

Since the beginning of this century **Germany** has been a country in which military order was a dominant element. Blind obedience made it possible to start two wars in which the strength of the German soldiers was their discipline and obedience. In the times of the Third Reich this blind obedience without questioning any superior authority due to threatening severe punishments led into a catastrophe which nearly eliminated the country from the maps. After this war with its cruel system, its atrocities and other inhumane appearances Germany was seeking to prevent any form of repetition and tried to correct the mistakes that had been made. One of these mistakes was the blind obedience asked from each soldier. The reflections of this change in the German law are obvious. The law as of today requires that the inferior at the time receiving his order judges its lawfulness. If he or she comes to the result that the order is unlawful, not given for an official

purpose or is infringing human dignity he or she is not bound to his general duty of obedience and he is allowed to refuse in terms of s22(1) Armed Forces Military Code. If he or she on the other hand regards the order as binding without realising the contrary s5(1) of the same law can grant an excuse making it still possible to hold accomplices criminal liable. In the very unlikely event that a binding order leads to an unlawful act, the soldier is protected since s34 of the German Criminal Code renders it lawful. But even under this provision the soldier first has to evaluate the situation before he comes to the conclusion that he would rather follow the order than omit the unlawful act.

Putting these facts together the German law favours the rational subordinate who not only obeys blindly but before he or she starts to act judges the order and the act expected from him or her before the order is carried out.

E.1.2 United States of America

The **United States of America** play more and more the role of the international police force when it comes to conflicts throughout the world. Mostly furnished with a mandate of the General Assembly of the United Nations[145] one can find American soldiers in nearly every armed conflict. In order to keep the huge number of soldiers under control and since the whole world is watching their action obedience and discipline are top priorities. In this context the words of the Massachusetts Supreme Judicial Court may be

[145] e.g. in Somalia, Kuweit and former Yugoslavia

recalled for they seem still best to describe even today's situation of the American soldiers:[146]

> „Even in time of peace obedience to orders is the first duty of a soldier. He is not expected to argue points of law with his superior officers."

In legal consequence of this the Model Penal Code had been drafted and s2.10 omitted the hypothetical element based on a reasonable or ordinary person. The result is a soldier who is not in need to first judge his or her superior's order because he or she faces charges only, if he or she positively knows that the given order is unlawful. On the other side refuse the courts to adopt the view of the American Institute who drafted the Model Penal Code already 1962. Though authority from recent years is scarce the courts seem still to favour an additional hypothetical approach in order to limit the applicability of this specific excuse.

E.1.3 South Africa

South Africa's history is also - until recently - characterised by military involvement and armed conflicts.[147] But *prima facie* the courts seem to ignore this status of South Africa as they also - like the US courts - apply a hypothetical test using „the reasonable man in the circumstances of a soldier"[148]. But what first looks like a similarity is on second sight the opposite. While the USA employ the reasonable man-test to limit the scope

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[146] Neu v McCarthy, p573
[147] e.g. the Angolan war
[148] Friedman J in S v Banda, p496

of the excuse based on superior order, South Africa employs this test to reduce the area of compulsory obedience. If it comes to the defence after committing an unlawful act in execution of a superior order the subordinate is always excused, except for the case of a „manifestly and palpably illegal order"[149]. Phrasing the scope of the excuse in this way brings South Africa right between the opinion of the US Courts and the discussed s2.10 of the Model Penal Code. It is more than the sole knowledge but less than what a reasonable man would judge to be unlawful.

E.2 Justification or excuse

Regrettably only Germany draws in connection with superior order acceptable lines between the defences of justification and excuse. But on the other hand this is no surprise, since this difference is crucial to the criminal liability of accomplices and the right to self-defence as discussed earlier on.

With regard to the other two countries the demarcation line has not yet been determined in a satisfying way. There seems no doubt that an unlawful act under a lawful order should be rendered lawful since an agent or instrument, due to their power that is only deriving from the principal, cannot turn legality into illegality. Especially with the duty of obedience framing the final act, the stigma of unlawfulness clinging to the inferior's act is highly unsatisfying. But with the same matter of course the unlawfulness of an act based on an unlawful order cannot be rendered lawful due to military discipline or obedience. The act has to be regarded as finally unlawful. The only problem to solve is the criminal liability of the subordinate in conflict.

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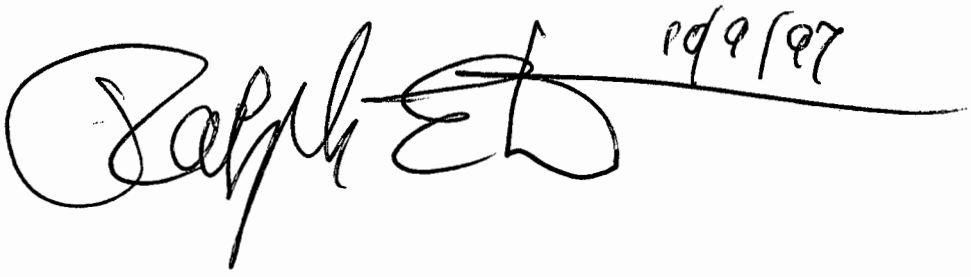
[149] *ibid*

Since justification is not the only way to escape liability also all aspects of culpability have to be carefully scrutinised. The conflict between obedience and avoidance of unlawful acts is already solved, since the soldier is under no obligation to obey an unlawful order. But under the pressure of each specific command and under the circumstances of every single case it can happen that he or she does not realise the unlawfulness or did realise but still felt bound to obey. These situations are clearly better comparable with cases of lacking *dolus* or missing awareness of unlawfulness than any other cases. But both cases concern *mens rea* and not the unlawfulness of the *actus*.

Beside this writers of criminal law have long written about 'unlawful' also meaning 'contrary to the *boni mores* of the community'. If the execution of an unlawful order leads to an act infringing the *boni mores*, how can then the unlawful order itself serve to render the act lawful? The majority of the legal writers is already voting for the solution based on the defence of excuse and it can only be short before the courts follow.



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S v Banda	Bophuthatswana General Division 1990 (3) SA 466 (B)
S v De Blom	Appellate Division 1977 (3) SA 513 (A)
S v Mule en 'n Ander	South West Appelate Division 1990 (1) SACR 517 (SWA)
S v Shepard	Witwatersrand Local Division 1967 (4) SA 170 (W)
United States v Bright	Pennsylvania Circuit Court (1809) Case No. 14, 647; 24 Fed. Cas. 1232 *et seq.*
United States v Calley	US Military Court of Appeal (1973) 48 CMR 19; 22 US CMA 534
United States v Decker	Federal Circuit Court (1962) 304 F.2d 702 (6th Cir.)